UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 NICHOLAS A. SOLT
United States Army, Appellant

ARMY 20130029

Headquarters, 7th Infantry Division
Stefan A. Wolfe, Military Judge
Major Christopher M. Ford, Acting Staff Judge Advocate (pretrial)
Major Jeri S. Hanes, Acting Staff Judge Advocate (post-trial)

For Appellant: Colonel Kevin Boyle, JA; Captain Brian D. Andes, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major Daniel D. Derner, JA; Captain Nathan S. Mammen, JA (on brief).

28 May 2015

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

An panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of conspiracy to steal military property of a value of more than $500; failure to obey a lawful order; false official statement; unauthorized sale of military property of a value of more than $500; wrongful possession of a Schedule III controlled substance; larceny of military property of a value of more than $500; and housebreaking in violation of Articles 81, 92, 107, 108, 112a, 121, and 130, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 881, 892, 907, 908, 912a, 921, 930 (2006). The panel sentenced appellant to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 214 days against the sentence to confinement.

We review this case under Article 66, UCMJ. Appellant raises three assignments of error and personally submits matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). His complaints regarding the panel's consideration of his co-conspirator's sentence and the dilatory post-trial processing in his case merit discussion and relief.

I. *Admission of Co-Conspirator's Sentence*

A. Facts & Procedural Background

Appellant was assigned to C Company, 4th Battalion, 9th Infantry Regiment, 4th Stryker Brigade Combat Team, 2d Infantry Division. Between on or about 1 December 2011 and on or about 3 January 2012, appellant conspired with Private (PVT) Joshua Chandler to steal and sell military property from the battalion.[1] Private Chandler promised to sell the property to subsequent buyers and share the proceeds with appellant. In furtherance of this conspiracy, appellant and PVT Chandler stole sensitive and high-value weapons accessories from the battalion armorer's office and PVT Chandler took them to Oregon and sold some of the items to Mr. BB. The military property's value exceeded $600,000. Without the stolen weapons accessories, C Company's February 2012 collective training exercise at Yakima Training Center was significantly degraded.

Private Chandler later agreed to cooperate with Criminal Investigation Command (CID) and met with appellant on 17 January 2012, while wearing a listening device that CID monitored. Private Chandler told appellant he was attempting to negotiate a $3,000 purchase price with a buyer and, as an interim payment, gave appellant $500 in controlled CID funds. CID agents apprehended appellant when the monitored conversation ended. Appellant later told PVT CS he was apprehended "because of the whole arms room investigation." Appellant also told Private CS he was involved in the property theft given that "he had to open the door for Private Chandler." Finally, appellant told PVT CS "that there were bolt cutters already in the supply room." After PVT CS disclosed these admissions to CID, every time appellant saw PVT CS, appellant called him "snitch" and "rat."

Private Chandler was a prominent government witness in appellant's trial, which occurred five months after PVT Chandler's own court-martial. Private

[1] Private Chandler was a Specialist (E-4) at the time he conspired with appellant to steal and sell the military property. Private Chandler, who was convicted of, *inter alia*, housebreaking, conspiracy, larceny, and sale of military property at a court-martial in July 2012, was reduced to the grade of E-1. We will refer to him as PVT Chandler in this opinion.

Chandler testified and incriminated appellant. Defense counsel tried to impeach PVT Chandler, implying that clemency prospects in his own court-martial motivated his testimony. In an Article 39(a) session before re-direct examination of PVT Chandler, trial counsel requested the military judge's permission to disclose PVT Chandler's court-martial sentence to the panel:

> TC: The witness wanted to please CID so he cooperated, and also wanted to please for his--to get post-trial relief. And the sentence is both relevant that--in the affect [sic] of any of his actions on his assistance from CID as well as to show that his--I guess it--it addresses his bias. Correction. A motivation to----
>
> MJ: You think the panel may infer that he -- as I understand it, it is a ten-year sentence?
>
> TC: Yes, Your Honor.
>
> MJ: The panel may infer it is a much larger sentence and therefore believe that there is a greater likelihood to avoid the much larger sentence and then is, in fact, reality?
>
> TC: Yes, Your Honor.
>
> MJ: Defense?
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> ADC: Your Honor, the defense was very cautious in his line of questioning. First of all, there was [sic] no values or, you know, there was no question saying we want X number this type of clemency, you want this type of relief. The fact is it is irrelevant what the nature of clemency or relief is. Somebody with a six-month sentence could want three months off. It is irrelevant the nature of the sentence. The focus of the questioning is that he is hoping for some sort of benefit for providing testimony here today . . . . I think the door has not been opened in this regard . . . .
>
> MJ: No, but the defense certainly--you certainly implied in your cross that the witness is--his testimony is being affected by his ability to please the government, right? That was----
>
> ADC: Mm-hmm.

> MJ: Right. And specifically, "Were you getting clemency?" So, the stakes that he is facing are certainly relevant. If the witness was facing a one-day sentence, clemency would not be that big of a motivator. If he is facing a life without parole sentence, there were [sic] be a huge incentive to get possibly whatever he could in terms of clemency from the government.
>
> ADC: Well, I think the question is actually moot given the witness's statement that he could care one way or less.
>
> MJ: Well, but you did not take that at face value, did you? I mean, that is . . . the issue of the witness's credibility and his motive to fabricate because of clemency is clearly now before the members. So, the relevancy objection is overruled. Anything else?

Defense counsel then maintained his objection under Military Rule of Evidence [hereinafter Mil. R. Evid.] 403, asserting that the panel's knowledge of PVT Chandler's sentence would distract the members from their immediate task to determine findings in appellant's case and, should sentencing occur, unfairly prejudice their ability to determine a sentence for appellant. Defense counsel further asserted that a curative instruction would not remedy the danger of unfair prejudice. After some discussion about the concept of gradated clemency objectives based on varying sentences, the military judge concluded:

> So, at a prior 802 session, the defense did indicate that they were not seeking--that they would not elicit evidence of Chandler's sentence although, I did specifically warn the defense that you may open the door to doing so at that 802. I frankly don't think I've ever faced the issue of whether evidence is . . . inadmissible under 403 because it will only have a prejudicial--it will not have a prejudicial effect on merits, but it may have a prejudicial effect on sentencing. I would find it unusual to exclude evidence on the issue of guilt solely because it may affect sentencing when we may never get the sentencing. I disagree with the defense that a limiting instruction properly tailored would not remedy this. It is used routinely in these cases to address it. So, the objection is overruled. I find there would be . . . some probative value in responding to the defense's claims about witness bias and motive to fabricate, which are not substantially outweighed by the danger of unfair prejudice, which I find

> to be none or practically none on the merits. Some on sentencing, but one that can be corrected with a tailored instruction. And, Defense, I will leave it to you to propose it and request that instruction and I give all fair instructions. And, certainly, this would be a fair one. There are some draft ones that you may want to consider.

On re-direct examination, Private Chandler told the panel he was convicted in July 2012 and sentenced to a dishonorable discharge, ten years confinement, and reduction to the grade of E-1. He was not questioned further, and the record does not indicate he had any agreement with the government to receive any sentence reduction in return for his testimony or cooperation in the investigation and prosecution of appellant. Before the members deliberated on findings, the military judge instructed them:[2]

> In deciding the believability of Private Chandler, you should consider all the relevant evidence including, but not limited to, the fact that he is seeking clemency, that he is facing a sentence of 10 years of confinement, and that he was ordered to testify truthfully.
>
> …
>
> The defense elicited evidence that Private Chandler has been convicted of certain crimes that may or may not involve circumstances that are similar or related to this case. That someone has been convicted of a crime is evidence that you may consider in determining their credibility. You may not use Private Chandler's convictions as evidence that the accused is also guilty of the crimes he is charged with, or any other inference adverse to the accused. Evidence that Private Chandler was convicted is not evidence that this accused is guilty of anything. The government must prove this accused's guilt completely independently. While you must follow all instructions, you should consider this instruction with exceptional seriousness.

[2] Despite the military judge's and defense counsel's discussion about limiting instructions, it is unclear from the record whether the instructions highlighted in this opinion were drafted by the military judge, defense counsel, or instead, resulted from their collaborative effort.

> The government elicited evidence that Private Chandler was sentenced to 10 years confinement. You may consider this evidence only for its tendency, if any, to show that Private Chandler was, or was not motivated to modify his testimony in order to receive clemency. Throughout the course of this trial, this is the only purpose for which you may use this testimony. You may not use this evidence to infer relative degrees of culpability, or to infer anything else adverse to the accused. This instruction must also be viewed with exceptional seriousness.

In their closing arguments on findings, neither trial nor defense counsel followed up on the competing theories about PVT Chandler's clemency objectives and their relation to his testimony. The panel deliberated and announced their findings.

Before the members deliberated on sentencing, the military judge instructed them:

> You may have heard evidence of the sentence received by other individuals testifying in this case. You are not to consider this information during deliberations in formulating a sentence in this case. The charges, evidence, and circumstances may be different in the two cases. For this reason, evidence concerning other sentences must be completely ignored by you. You must determine an appropriate sentence for this accused based on the evidence you have heard and the crimes for which he stands convicted.

The court closed for the panel's sentencing deliberations. Fifty-one minutes later, the panel announced appellant's sentence: dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. Appellant received practically the same sentence as his co-conspirator, PVT Chandler.

B. Law and Analysis

Appellant now argues the military judge abused his discretion when he allowed testimony regarding the sentence of appellant's co-conspirator to be presented to the panel. We agree.

In reviewing a military judge's decision to admit evidence, we apply the abuse of discretion standard. *United States v. Piren*, 74 M.J. 24, 27 (C.A.A.F. 2015).

We hold that evidence of PVT Chandler's court-martial sentence terms was not relevant under Mil. R. Evid. 401, and therefore, the judge abused his discretion in allowing the panel to hear this evidence. *See* Mil. R. Evid. 402 ("Evidence which is not relevant is not admissible."). The government's theory of admissibility—that appellant's motive to cooperate with the government was somehow diminished because he faced ten years of confinement instead of a more lengthy term—was unsound.[3] Private Chandler's *exact sentence* was neither directly nor indirectly probative of his credibility as a government witness. *See* Mil. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Assuming *arguendo* PVT Chandler's sentence was relevant, we further hold the military judge abused his discretion in concluding pursuant to his Mil. R. Evid. 403 analysis that the probative value of the evidence "in responding to the defense's claims about witness bias and motive to fabricate . . . [was] not substantially outweighed by the danger of unfair prejudice, which I find to be none or practically none on the merits."

First, disclosure of PVT Chandler's sentence confused the issues during appellant's trial and wasted time. Private Chandler's exact sentence and its particularized effect on him with regard to clemency invited fanciful speculation on what motivates different people. One need only consider that the universe of plausibility includes: appellants who fight tooth and nail in the hope of reducing what another may consider brief confinement; others who would readily trade a punitive discharge for additional years of time confined; and, others still who view a record of felony conviction as *per se* fundamentally decisive punishment and actual sentence terms as surplus. This far from exhaustive list illustrates the possibility of a mini-trial which, among other things, Mil. R. Evid. 403 is intended to prevent.

Second, and more importantly, the attendant risk of unfair prejudice was acute because the panel's knowledge of PVT Chandler's sentence *at best* rendered an individualized sentencing process less likely. Additionally, PVT Chandler's adjudged dishonorable discharge was the most severe punitive discharge for which he was eligible at a court-martial; there was no proffer of relevance in support of

[3] The theory of admissibility, which the government ultimately adopted, originated from the judge.

this highly prejudicial fact. These facts evinced that the danger of unfair prejudice outweighed any minimal probative value under Mil. R. Evid. 403.

We must now determine whether the erroneously admitted evidence prejudiced appellant both during the merits and sentencing portions of his trial. Turning first to its effect on the merits, "[t]he test for nonconstitutional evidentiary error is whether the error had a substantial influence on the findings." *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014) (quoting *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)) (internal quotation marks omitted). The government bears the burden of demonstrating "that the admission of erroneous evidence is harmless." *Id.* We consider the strength of the government's case, the strength of appellant's case, the materiality of the evidence in question, and the quality of the evidence. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

We do not find the erroneous admission of PVT Chandler's sentence undermined the findings in this case. The government's findings case was overwhelming, notwithstanding the evidence regarding PVT Chandler's sentence. Appellant's conversations with PVT Chandler and statements to PVT CS eliminated any doubt whether he was criminally involved in the housebreaking, conspiracy, theft, and sale of military property. The strength of appellant's defense on findings, while ably advanced by defense counsel, was not objectively persuasive. Finally, though PVT Chandler's sentence was neither material nor of sufficient quality to warrant presentation to the panel, we find the panel's knowledge of it did not substantially influence their findings of guilt.

Our sentencing prejudice analysis is different. Given our finding that the evidence of PVT Chandler's sentence should never have been considered by the panel *for any reason*, we are faced with a similar situation as our superior court in *United States v. Reyes*: we must determine if the error "had a prejudicial impact on the process by which the members determined the appropriate punishment." 63 M.J. 265, 267 (C.A.A.F. 2006). In this context, the test for prejudice is whether "the panel might have been 'substantially swayed' by the error during the sentencing process." *Id.* (citation omitted).

Considering appellant's sentence was virtually identical to PVT Chandler's, we readily identify three scenarios: (1) the panel correctly disregarded PVT Chandler's sentence when deciding appellant's sentence; (2) the panel intentionally or otherwise remembered PVT Chandler's sentence and used it as a benchmark to consider whether to escalate or de-escalate appellant's sentence; or (3) the panel intentionally remembered PVT Chandler's sentence and purposefully sentenced appellant to the same sentence as that of his co-conspirator.

> "[I]t has long been the rule of law that the sentences in other cases cannot be given to court-martial members for

> comparative purposes." This rule seeks to keep courts-martial from becoming engrossed in collateral issues and recognizes the UCMJ's emphasis on individualized consideration of punishment. "[P]roper punishment should be determined on the basis of the nature and seriousness of the offense and the character of the offender, not on many variables not susceptible of proof."

United States v. Barrier, 61 M.J. 482, 485 (C.A.A.F. 2005) (quoting *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)) (alternations in original).

We fully recognize the important presumption that a panel follows a military judge's instructions. *See United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). However, contrary facts can rebut the strongest presumptive principles. *Id.* Such is the case here. The military judge's decision to issue multiple limiting instructions regarding PVT Chandler's sentence showed his understanding of the rule announced in *Mamaluy* and followed in *Barrier*. However, he did not issue the instructions until nearly two days after the inadmissible information was presented to the panel. Limiting instructions are not always effective in mitigating an error's prejudicial effect. *See generally United States v. Tawes*, 49 C.M.R. 590 (A.C.M.R. 1974). In this case, they propagated the erroneous determination that irrelevant information was, instead, relevant. The instructions thrice reminded the panel of matters which they should have never heard. Consequently, despite the limiting instruction, we find—*at minimum*—the panel "might have been 'substantially swayed' by the evidence [of Private Chandler's sentence] in adjudging its sentence." *Reyes*, 63 M.J. at 267.

We must now determine whether this court is capable of curing the prejudicial effect of the error by reassessing the sentence or whether we must send the case back for a sentence rehearing. Having considered our superior court's guidance in both *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), a rehearing is warranted because we cannot reliably determine the lowest likely sentence a panel would have adjudged absent the erroneous admission of PVT Chandler's sentence. *See Winckelmann*, 73 M.J. at 14-15 (citing *Sales*, 22 M.J. at 307-08). While the factor of appellant's election to be tried by an enlisted panel is not by itself dispositive, we conclude the better judgment here is to preserve appellant's ability and right to have his court-martial sentence lawfully determined in that forum.

II. *Dilatory Post-Trial Processing*

A. Background

Appellant was sentenced on 11 January 2013. On 14 November 2013, appellant's defense counsel demanded speedy post-trial processing. On 19 November 2013, the Acting Staff Judge Advocate signed the recommendation. Appellant received the post-trial recommendation and record of trial on 20 December 2013; the next day, defense counsel submitted appellant's post-trial matters. The Acting Staff Judge Advocate signed the addendum on 14 January 2014. The convening authority took action the same day. In a contemporaneous memorandum dated 2 February 2014, the 7th Infantry Division's Chief of Military Justice focused primarily on personnel challenges as the cause of delay.

B. Law & Analysis

Appellant also requests relief for dilatory post-trial processing where the convening authority took action 368 days after appellant was sentenced. Considering appellant's meritorious assignment of error regarding admission of his co-conspirator's sentence, we examine whether the delay violated his due process right to timely post-trial processing. *See Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) ("An appeal that needlessly takes ten years to adjudicate is undoubtedly of little use to a defendant who has been wrongly incarcerated on a ten-year sentence." (quoting *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996))) (internal quotation marks omitted).

We apply the four-factor test in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the post-trial delay in this case results in a due process violation. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). These factors are: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a timely review and appeal; and (4) prejudice. *Id.* (citing *Barker*, 407 U.S. at 530).

In *Moreno*, our superior court established a "presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial." *Id.* at 142. "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation." *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

We hold that all four of these factors ultimately weigh in favor of appellant. First, the length of the delay–368 days from sentence to action–is presumptively unreasonable. *See id.* at 142. This factor weighs in favor of appellant.

Second, the majority of the delay rests on the government's shoulders. The only delay attributable to the defense are the 21 days counsel used to complete errata of the record. This 1099-page record was not complex, but 285 days elapsed between sentencing and authentication alone. The government's explanations for the delay primarily involved personnel challenges. Our superior court has held "that personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011). The reasons for delay weigh in favor of appellant.

Third, appellant asserted his right to speedy post-trial review. This factor also weighs in favor of appellant. *See Barker*, 407 U.S. at 531 ("The more serious the deprivation, the more likely a defendant is to complain.").

Fourth, we review three sub-factors when analyzing prejudice in the context of a due process violation for post-trial delay:

> (1) prevention of oppressive incarceration pending appeal;
>
> (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and
>
> (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

Moreno, 63 M.J. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)) (internal quotation marks omitted).

The first sub-factor is "directly related to the success or failure" of appellant's substantive appeal. *Id.* at 139. "If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive." *Id.* (citation omitted). Appellant has served confinement as part of a sentence which we set aside in our decretal paragraph. "[I]f an appeal is not frivolous, a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed . . . ." *Id.* (quoting *Rheuark*, 628 F.2d at 304) (internal quotations omitted). This sub-factor weighs in favor of appellant.

The second sub-factor requires "an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* at 140. Because appellant has not made this showing, we weigh this factor in favor of the government.

The third sub-factor is relevant when a rehearing is authorized, as is the case here. *Id.* "In order to prevail on this factor an appellant must be able to specifically identify how he would be prejudiced at rehearing due to delay. Mere speculation is not enough." *Id.* (citation omitted). Perhaps because appellant requests we reassess his sentence to cure any prejudice from the panel's possible consideration of his co-conspirator's sentence—and does not discuss whether a rehearing is appropriate—his brief does not address this issue. This factor weighs in favor of the government.

In balancing the *Barker* factors, we hold appellant's due process right to a timely post-trial review has been violated. We are not convinced the post-trial delay was harmless beyond a reasonable doubt. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006) ("If we conclude that an appellant has been denied the due process right to speedy post-trial review and appeal, 'we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless.") (quoting *Toohey*, 63 M.J. at 363).

Having found a due process violation, we must determine an appropriate remedy. In *Moreno*, our superior court provided a range of available remedies:

> (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice.

63 M.J. at 143.

The remedy in this case should not require the government to forfeit its effort to obtain a lawful sentence. We believe the appropriate remedy for the dilatory post-trial processing in this case is to limit the possible punishment that the convening authority may approve following a rehearing to a punitive discharge, confinement for nine years and four months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The sentence limitation corresponds with the approximate amount of time by which the government exceeded the 120-day post-trial processing standard.

CONCLUSION

The findings of guilty are AFFIRMED. The sentence is set aside. A rehearing on sentence may be ordered by the same or a different convening authority, subject to the punishment limitation supra.

Senior Judge LIND and Judge KRAUSS concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court